Aim and Purpose of an International Court of Justice

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THE aim and purpose of an international court of justice is to decide disputes of a justiciable nature —that is to say, disputes which can be submitted to a court and be determined by principles of justice expressed in rules of law, which may and must of necessity arise between and among nations. To enable the court to act and to bring forth the fruits of justice, an agreement of the nations is required that such disputes shall at their beginning and before they assume political importance be automatically submitted to the tribunal, the constitution of which is known in advance, to the end that the judges ready to receive the dispute and to hear arguments, may decide the controversy by the application of generally recognized and accepted rules of law. In this way, the chancelleries of the world are relieved of a cause of friction too often a source of irritation and a thorn in the flesh plucked, as it were, from the side of the nations.

The function, then, as I take it, of an international court of justice is not primarily to make but to declare and administer law in such disputes and controversies as the nations may in their wisdom or in enlightened self-interest bind themselves to submit, either by special or general agreement, to a determination of this agency of justice.

A PERMANENT TRIBUNAL

It looks as if we are about to have a permanent tribunal of this nature. The project is not new; it is old, like most good things. But it seems to be new because it has achieved a greater prominence than formerly and it is today uppermost in the minds of all thoughtful men and women.

In 1907, at the Second Hague Peace Conference, a draft convention, dealing with the composition, the jurisdiction and the procedure of an international court of justice, was agreed upon by the forty-four nations meeting in conference at The Hague. It was found impossible, however, owing to the conflict of interests, the difference of views, and also to the limited time at the disposal of the conference, to hit upon a method of appointing the judges which would be acceptable to all the nations there represented. Unable to find a method ready at hand, or to devise one during the storm and stress of the conference, a resolution or a recommendation was adopted, approving the draft convention for the court of international justice, called the Permanent Court of Arbitral Justice, to be submitted to the nations, requesting them at the same time to attempt to devise a method of appointing the judges through diplomatic channels which would be acceptable to the nations, without specifying any number, but leaving it open to those minded to accept such a tribunal to coöperate in its constitution.

So matters rested at the end of this world conference. During the ensuing seven years there were meetings of delegates from different countries. In 1910 an agreement was reached between Germany, France, Great Britain and the United States to constitute a court by the method adopted for the appointment of judges of the Prize Court when that tribunal should be organized. This would postpone the court of arbitral justice to the prize court, which it was found difficult to create because Great Britain was unwilling to establish or to coöperate in its

establishment unless there were an agreement had in advance upon the principles of justice and the rules of law to be applied in the decision of cases which might be referred to it. A serious attempt was made to reach an agreement upon the law to be applied, and at the request of Great Britain representatives of the ten leading maritime powers met at London on the second of December, 1908, and agreed upon the so-called Declaration of London, which seemed to the delegates of these countries to state the law to be applied in an acceptable form. However, public opinion in England declared itself against the Declaration to such a degree that Great Britain did not take steps to approve it. The prize court could not be established, and the court of arbitral justice, dependent upon it, shared its fate. It was, therefore, deemed advisable to attempt to set up the court of arbitral justice independently, and the Minister of Foreign Affairs of The Netherlands accepted a proposition and agreed to transmit it to nine of the then leading powers, according to which these powers would constitute it for themselves.

The problem was here a very simple one, because in a court of limited numbers each could appoint a judge, and, as nine nations were to be invited, the court would consist of nine judges. Such a tribunal would be international but of limited usefulness. Therefore, it was provided that the court should be open to all nations, upon a footing of equality, which should care to use it, in that each nation not represented upon the bench was authorized to appoint a judge to take part in the trial and the disposition of a case to which it was a party.

This method was calculated to secure the court and to try it out on a small scale. It was, therefore, practicable. Theoretically, it was open to criticism, and would be very faulty in a municipal court in which the parties in litigation have no right to choose their judges or indeed to enter into any relations with them. It was not so faulty, however, from the international standpoint, although it is objectionable in theory that representatives of nations should take part in the decision of a controversy affecting their countries, inasmuch as they may be prejudiced, and are, as a matter of course, prejudiced in behalf of their own state. It must be said, however, in its behalf that, if the number of judges is large, so large indeed that the representatives of the parties in litigation form a small minority of the court, it is, if not in accord with theory, nevertheless practicable.

Indeed, it has compensating advantages, because the presence of enlightened judges of the countries in litigation upon the bench is a guarantee that the systems of law and procedure obtaining in their countries are laid before their colleagues, with the result that the court is an understanding court and, therefore, likely to be an acceptable and an efficient court.

INTERNATIONAL JUSTICE

The war came on and the steps were not taken. However, in Article 14 of the Covenant of the League of Nations there is a provision that the Council of the League should draft a project for the establishment of an international court of justice, to be submitted to the members of the League for their approval. In order to aid the Council in their task, some twelve jurists of various countries were requested to act as an advisory committee. Of the ten who accepted the invitation, five came from the large, five from the smaller powers. They met in conference at The Hague during the months of June and July of

1920, and, as the result of much discussion and in a spirit of conciliation, a project for an international court of justice was agreed upon. It was submitted to the Council and with certain changes approved, and by that body transmitted to the first Assembly of the League of Nations which met in Geneva in November, 1920.

With some considerable modifications by that body, which changed, I believe, the nature of the tribunal from that of a court of international justice, or a court of justice in the strict sense of the word, to a tribunal of arbitration with a permanent panel of judges, it was adopted by the Assembly and recommended to the nations of the world. It is perhaps more accurate to say that it was recommended in first instance to the members of the League of Nations for ratification. But, in effect, it was a recommendation to all nations, inasmuch as the project provides that members of the society of nations which are not members of the League are to have the privilege of presenting their disputes to the court upon a basis of equality and to have them decided upon what we may call due process of law.

The draft prepared by the advisory committee of jurists, of which Mr. Elihu Root—a name never to be mentioned without respect and indeed without a sense of gratitude—was the American member, provided for what may be called obligatory jurisdiction. Let me recall, before taking up this phase of the subject, the problem which confronted the jurists. In 1907 it was found impossible, as I have already stated, to agree upon a method of appointing the judges which would be acceptable to the nations at large, which were, however, urged to discuss the matter through diplomatic channels and to agree upon a method which the Conference was not able to suggest. The result was in fact, although not in theory, that the Advisory Committee practically took the draft convention of 1907 for the creation of a court of arbitral justice, supplied a method of appointing the judges and added to the draft certain provisions which seemed to the members of the Committee necessary in order to convert it from a court of arbitral justice into a court of justice in the strict and technical sense of the word.

What is this difference? Merely this: In the language of the Pacific Settlement Convention of the First Hague Conference of 1899 and of the second body of that name of 1907, arbitration is the settlement of controversies between nations by judges of their own choice. In choosing the judges and agreeing to submit the controversy to arbitration, the countries very often agree upon the facts or the questions to be submitted and at the same time reach an agreement upon the principles of law to be applied, if in their opinion such principles do not exist. A court, on the other hand, presupposes the existence of rules of law which the judges are to declare and to apply, not to create, although they do develop law.

TRIBUNAL OF ARBITRATION

The project as originally drafted by the Advisory Committee provided that there should be a permanent personnel of judges in existence, ready to take up the question at issue and to decide it according to the principles of law. Therefore, the judges and the law exist in advance of the dispute. A tribunal of arbitration, on the other hand, is a possibility. It is not a fact. It is created by the parties in dispute and usually in the storm and stress of controversy, when they are least able to agree upon the selection of judges. As a court is a body of known determina-

tion, the judges whereof are appointed in advance and without respect to any controversy then pending or about to exist, the project of 1920 as originally drafted by the Advisory Committee contemplated a court in the technical sense of the word, as distinct from the tribunal of arbitration. There can be no doubt as to this, inasmuch as the judges were to be appointed in advance of the creation of the court, and were to assume jurisdiction in a certain category of questions. This category in question was lifted bodily from the 13th article of the Covenant of the League of Nations, the text whereof, in so far as it is material to the present purpose, provides for the interpretation of a treaty, for the determination of any question of international law, for the existence of any fact which if established would constitute a breach of an international obligation, and the nature and extent of reparation to be made for the breach of an international obligation.

To these four categories, the Advisory Committee added a fifth: the interpretation of a judgment of the court. Within this rather large domain, the court was to "function," to use a rather odd expression which has already become common in this connection. Here a hitch occurred. The 13th article of the Covenant did not say that the members of the League bound themselves to submit their disputes of this nature to arbitration and contented itself with the statement that they "are declared to be among those which are generally suitable for submission to arbitration." This was a word of advice or a hint. It was not a command. It required an agreement of the nations to make this jurisdiction obligatory. The Advisory Committee believed that this should be done, and they were of the opinion that the acceptance of the project would bind the nations accepting it to permit their disputes included within the five categories to be submitted to the court and to be passed upon by due process of law.

Their institution was therefore to be a court, with known judges, known jurisdiction and known law. A necessary consequence would be that the complainant nation could invite the nation with which it had a controversy of this character to appear before the bar of the court by its appropriate representative or agent. Another necessary consequence would be that if the nations so invited to appear failed to do so, then the plaintiff or complainant which had presented its case could proceed *ex parte*, lay the facts before the court, argue the principles of law which the plaintiff considered to be applicable and have the court decide the controversy upon the case as stated by the plaintiff and the law found applicable by the judges.

OBLIGATORY JURISDICTIONS

This is the meaning or the consequence of obligatory jurisdiction, in the sense in which I understand that term. I must admit, however, that some people are, like the German professor, of another opinion. They regard compulsory jurisdiction as the bringing of the parties before the court by compulsion of some kind if they refuse to appear. This seems to me to narrow the phrase unduly.

The jurisdiction is obligatory upon the court. It is obligatory upon the parties to such a degree that if the defendant duly invited fails to appear, judgment may be had against it by the plaintiff proceeding *ex parte* in the absence of the defendant. This interpretation of the term has the great advantage of setting the court in operation at the instance of the party primarily interested, instead of making the action of the court depend upon the presence of the other party whose

interest it is to keep away from court. This interpretation has also the further advantage of stating the sense in which the Advisory Committee understood the term, and Article 52 of its project provided in express terms that:

> Whenever one of the parties shall not appear before the court, or shall fail to defend his case, the other party may call upon the court to decide in favor of his claim.
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> The court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

It is to be observed that the exercise of jurisdiction in such a case depends upon Article 33, as well as upon Article 34, limiting obligatory jurisdiction to the five categories which have already been mentioned.

What is this Article 33? Without quoting it, it is sufficient to state that a resort is not to be had to the court unless and until it has been found impossible to settle the dispute by diplomatic means, and that the court itself is to determine whether diplomatic means have been exhausted and whether the dispute falls within the limited jurisdiction of the court. As the court is meant to supplement, not to reject, diplomatic discussion, and only takes up the case after the breakdown of diplomacy, it was perhaps not necessary to state it. It was, however, advisable to do so, that the nations might be convinced that in a proceeding *ex parte*, the rights of the absent state would be safeguarded.

How is the law to be found which the court is to apply in the decision of disputes falling within its obligatory jurisdiction? Rules were clearly necessary if an innovation of this kind were to be considered, much less accepted. Therefore, Article 35 immediately following that creating obligatory jurisdiction, provides that—

> The court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:
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> (1) International conventions, whether general or particular, established rules expressly recognized by the contesting states;
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> (2) International custom, as evidence of a general practice, which is accepted as law;
>
> (3) The general principles of law recognized by civilized nations;
>
> (4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This is sound doctrine, but it was found to be too strong a diet for the large states. They were willing to form the court and to use it betimes, but they insisted that each controversy should be laid before the court by a special agreement.

At first sight, the difference may seem to be a question of form. It is that, and more. It is a question of substance. For if the court can only assume jurisdiction of a dispute laid before it by a special agreement, it means that the parties, not the court, make the case, that a complainant nation can not invite or summon or hail the defendant nation before the court, in order that there may be a decision upon the merits of the quarrel. Therefore, when this provision went to the Council, in which the large states are in the majority, there was some doubt as to its acceptance. There was none, however, when it left the Assembly of the League of Nations, because it was removed, body and soul, from the project of the Advisory Committee, and in its place there appears Article 36, to the effect that the court is competent to consider "all cases which the parties refer to it and all matters especially provided for in treaties and conventions in force."

However, some of the smaller states resented this mutilation of the project, as they called it, and provided that the nations in favor of obligatory jurisdiction should be permitted to go a step further and over their signatures restore to the court its obligatory jurisdiction, whereof the large states had deprived it.

"The members of the League of Nations," to quote the exact language of Article 36, "and the states mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation, the jurisdiction of the court" in the four categories of the original project, excluding therefrom the interpretation of its judgment. It was further provided that the declaration might be made "unconditionally or on condition of reciprocity" on the part of several or certain members or states, or for a certain time.

The result of the action of the Council and of the Assembly of the League of Nations is that we are to have a permanent body composed of a permanent panel of judges, ready to take jurisdiction of any dispute which the parties in controversy may agree to submit to that tribunal. But one party alone can not invoke the jurisdiction of the court, and the court can not reach a decision if it were so addressed unless the parties in controversy, either at the signing of the agreement to establish the court or at some later time, shall express their willingness to allow the court to function as it would under the unmutilated project of the Advisory Committee.

It is a noteworthy fact, but nevertheless a fact, that not a single one of the large nations has agreed to obligatory jurisdiction in signing the court project, whereas a goodly number of the smaller states have so agreed. What is the reason?

SETTLEMENT OF DISPUTES

The large nations have two ways of settling their disputes: By means of justice, when justice seems to favor their contention; by means of the sword, if justice be lacking. "When the lion's skin falls short, they eke out with the fox's," to press again into service a much-quoted phrase. The smaller nations, on the other hand, have only one defense—a shield or a buckler of justice, not a sword, and to have their disputes settled without the sword they are willing to sue or to be sued upon any dispute of a justiciable nature, either by their little brethren or by the larger states which have usually become great by injustice.

Whether much use will be made of the alternative method of procedure provided is a question for the future to decide, but upon it will depend whether we are to have an institution duplicating the so-called Permanent Court of Arbitration at The Hague, with a permanent personnel, or a permanent court of justice, making a reasonable approach to the Supreme Court of the United States.

If we look at the project drafted by the Advisory Committee of Jurists assembled last summer at The Hague, we will find that it contains no provision for the execution of the judgments of the court. This is a mooted question. Many there are who believe that in the present state of the world, nation should be allowed to sue nation, leaving the execution of the judgment to depend upon the good faith of the nations involved under the pressure of an insistent and an enlightened public opinion. Many there are, on the other

hand, whose judgment is entitled to the greatest respect, who insist that a court without power to enforce the decrees which it has rendered is an impotent thing, unworthy of the support of the nations of the world. Without expressing an opinion on this question, let me say that courts began without any power on their part to execute their decisions, and that this power was added in the course of time, because it was found to be necessary in the administration of justice.

It may be that the nations will be more willing to agree to an institution if they are not compelled either by economic pressure or by force of arms to execute the judgment of the court or to consent to its execution by such means. It may be that the agreement of the nations in good faith to abide by the results of the decision may suffice. If not, the nations will assuredly, in the light of the experience which they are to have with the court, devise some method of securing compliance with its decisions, provided only the court by its judgments convinces the world of the justness of its decisions and the desirability of their execution.

In drawing these observations to a close I would like to sound a note of warning. A witty person has said—I do not know his name, his race or his profession, but he must have been a man of large practical experience—that the greatest enemy of reform is the reformer. Like all general statements, this is to be taken "with a grain of salt," but the meaning seems to be that the reformer, intent upon his ideal, and having the distant goal always before his eyes, is anxious to cover by a single leap the vast distance separating him from reality and the goal.

Nations, unlike the reformer, are slow-footed; let us hope that they are sure-footed as well. They are unwilling to take a step in advance unless they see where it will lead them, and therefore it seems to people—at least to some of them who have had practical experience with the creation of a permanent court of international justice—the part of wisdom to agree upon what the nations are willing to accept and abide by. Otherwise, the agreement, however carefully drawn, may fail of ratification, and, if ratified, it may not be carried into effect.

Scraps of paper are not solely of European manufacture, and we have an example at home which should give us pause. On February 6, 1778—a date never to be forgotten—the American commissioners, of whom Benjamin Franklin was one, set their hands and seals to a Treaty of Amity and Commerce with France, whereby the United States granted certain exclusive privileges to our friend in need. On the same day, a treaty of alliance was concluded with France. In form, they are two treaties; in fact, they are one, and they are so considered. "The essential and direct end" of the treaty of alliance was, as stated in the second article thereof, "to maintain effectually the liberty, sovereignty, and independence absolute and unlimited, of the said United States, as well in matters of government as of commerce."

In addition, the treaty looked to the future, after peace should be concluded between the United States and Great Britain on the one hand and France and Great Britain on the other. In the eleventh article, dealing with this phase of alliance, it is stated in express terms that:

> The two parties guarantee mutually from the present time and forever against all other powers, to wit: The United States to His Most Christian Majesty, the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace: And His Most Christian Majesty guarantees

on his part to the United States their liberty, sovereignty and independence, absolute and unlimited, as well in matters of government as commerce.

When the wars of the French Revolution broke out, to which Great Britain became a party, but in which the United States was able to preserve its neutrality, John Jay, then Chief Justice of the Supreme Court of the United States, was sent to England on special mission, in order to prevent a rupture with Great Britain, which then seemed imminent. He was able to conclude and sign, on November 19, 1794, the treaty which bears his name, according to Great Britain some of the rights which had been exclusively granted to France in the Treaty of Amity and Commerce.

It is as idle to contend that the Jay treaty was consistent with the Treaty of Amity and Commerce with France as it is futile to maintain that we complied with the guarantee solemnly made to our first and our only ally of the then "possessions of the Crown of France in America." It was apparently in the interest of the United States to violate the treaty. It did so, and by a subsequent agreement of the parties, the treaty was abrogated, which neither had observed under the pressure of an impelling necessity.

We are, therefore, justified in saying, with our own example before our eyes, that nations will not agree to an obligation which at the time of its conclusion does not seem to them to be in their present interest, or which they do not at the time of signing conceive to be in their future interest; and that, when the contingency arises for the application of the treaty, if it be not then in their interest, they themselves being the judges, they will find some method of defeating the obligation which they had solemnly contracted.

Therefore, it seems to many the part of wisdom to agree only upon an advance at any particular time that can willingly and without compulsion be made, leaving it to the future and in the light of experience to take the next step, and later a farther step and indeed an infinite series of steps, which point to, if they do not actually reach, the ultimate goal.

The project of the Advisory Committee of Jurists for the creation of a permanent court of international justice, elaborated with such skilful and generous hands, was questioned by the Council, and it left the Assembly mutilated and disfigured. It can, however, be amended, if the nations care to restore its original features, or, indeed, to improve upon them, for human endeavor is faulty at best, and is a compromise between the desirable and the attainable.

We may draw comfort from the experience of one Solon, who said, in reply to a criticism of the laws which he devised for the Athenians, that he did not submit to them the best which he could draft, but the best which they would accept.

The Jurisdiction and Powers of an International Court

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WE are to consider how far the jurisdiction of an international tribunal can be made obligatory upon the parties, and by what means, if any, its decisions can be enforced. Upon the tremendous importance of these problems it is needless for me to dwell. The right solution of them is obviously